

What Steps Do I Take Before Filing an H-2A Application?

Prior to filing an Application for Temporary Employment Certification, the employer must prepare a job offer on the [ETA Form 790](#) - Agricultural and Food Processing Clearance Order and submit the form and all attachments to the State Workforce Agency (SWA) serving the area of intended employment for intrastate clearance. The following requirements must be met:

1. The job order must be submitted to the SWA no more than 75 calendar days and no fewer than 60 calendar days before the start date of the job;
2. The job order must be identified as one that will be used in connection with a future filed Application for Temporary Employment Certification ([ETA Form 9142](#)) with the U.S. Department of Labor; and
3. The contents of the job order must satisfy the requirements of 20 CFR part 653, subpart F and 20 CFR 655.122.

If the job opportunity is located in more than one State within the same area of intended employment, the employer may submit a job order to any one of the SWAs having jurisdiction over the anticipated worksites. Where the job order is being placed in connection with a future master application to be filed by an association of agricultural employers as a joint employer, the association may submit a single job order to be placed in the name of the association on behalf of all employers that will be duly named on the future filed [ETA Form 9142](#).

Upon receipt of the job order, the SWA will review the job order and notify the employer in writing of deficiencies in the job order no later than seven (7) calendar days after it has been submitted. The employer must respond to the SWA within five (5) calendar days after receipt of the SWA notification. The SWA must respond to the employer's response within three (3) calendar days. Once accepted by the SWA, the job order will be active until the end of the recruitment period, which will extend through 50 percent of the period of employment.

Where do I file ETA Form 790?

Submit a complete ETA Form 790 along with attachments and supporting documentation to:

Nebraska Department of Labor
Foreign Labor Certification
P.O. Box 94600
Lincoln, NE 68509-4600

What Documents Must I File with the OFLC Chicago NPC?

All agricultural employers who desire to hire H-2A foreign agricultural workers must apply for certification from the Secretary by filing the following with the OFLC Chicago NPC:

- Completed [ETA Form 9142](#) - Application for Temporary Employment Certification;
- Completed [ETA Form 9142 - Appendix A.2](#) bearing the original signature of the employer and, if applicable, that of the employer's attorney or agent); and
- Copy of the [ETA Form 790](#) and all attachments

Master applications filed by associations - An association may file a master application on behalf of its employer-members covering multiple areas of intended employment only where the association is filing as a joint employer and the application (a) covers the same occupation or comparable work for all employer-members, (b) reflects the same start date of need for all employer-members, and (c) covers no more than two(2) contiguous states. The association must identify on the application or in an attachment by name, address, total number of workers needed, the crops and agricultural work to be performed, and each employer that will employ H-2A workers.

Additional filing requirements for H-2A Labor Contractors (H-2ALC) - An application filed by an H-2ALC must be limited to a single area of intended employment in which the fixed-site employer(s) to whom an H-2ALC is furnishing employees will be utilizing the employees. An H-2ALC must include the following information in its application:

- Name and location of each fixed-site agricultural business to which the H-2ALC expects to provide H-2A workers, the expected beginning and ending dates when the H-2ALC will be providing the workers to each fixed site, and a description of the crops and activities the workers are expected to perform at such fixed site;
- A copy of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor (FLC) Certificate of Registration, if required, identifying the specific farm labor contracting activities the H-2ALC is authorized to perform as an FLC;
- Proof of its ability to discharge financial obligations under the H-2A program by including a surety bond under original signature. The bond document must clearly identify the issuer, the name, address, phone number, and contact person for the surety, and provide the amount of the bond and any identifying designation used by the surety for the bond;
- Copies of the fully-executed work contracts with each fixed-site agricultural business; and
- Where the fixed-site agricultural business will provide housing or transportation to the workers, proof that all housing used by workers and owned, operated or secured by the fixed-site agricultural business complies with the standards of the H-2A program and certified by the SWA and all transportation between the worksite and the workers' living quarters that is provided by the fixed-site agricultural business complies with all applicable Federal, State, or local laws and regulation.

Additional filing requirements for agents - An agent filing an application on behalf of an employer must provide a copy of the agent agreement or other document demonstrating the agent's authority to represent the employer. In addition, the agent must provide a copy of the MSPA FLC Certificate of Registration, if required by MSPA, identifying the specific farm labor contracting activities the agent is authorized to perform.

When Can I File the H-2A Application Package?

A complete application package must be filed with and received by the OFLC Chicago NPC at least forty-five (45) calendar days before the first date on which workers are needed. Employer may not file with the OFLC Chicago NPC until after the job order has been submitted to and reviewed by the SWA in accordance with the regulatory timeframe (i.e., no more than 75 days and no less than 60 days before the anticipated start date of work).

However, the OFLC Chicago NPC may waive the regulatory timeframes for filing in emergency situations pursuant to 20 CFR 655.134 (e.g., first time filers, unforeseen changes in market conditions), and where the employer is unable to resolve deficiencies in the job order with the SWA or the SWA is unable to respond to the employer's job order within the regulatory timeframes.

Where Do I File the H-2A Application Package?

A complete application package ([ETA Form 9142](#), [ETA 790](#) / attachments, and supporting documentation) may be mailed or delivered by private mail courier to the following address:

U.S. Department of Labor
Employment and Training Administration
Office of Foreign Labor Certification
Chicago National Processing Center
536 South Clark Street, 9th Floor
Chicago, IL 60605 -1509
Attention: H-2A Program Unit

What will happen after I submit an H-2A application?

The OFLC Chicago NPC will review an employer's application promptly. Normally, within seven (7) calendar days after receipt of an application, the OFLC Chicago NPC will notify the employer in writing of the decision to accept or reject the employer's application. Copies of the notification will be sent to the employer and, if applicable, the employer's attorney or agent by means normally assuring next day delivery. If the initial application is accepted or amended within the required time frame and complies with the regulations, the OFLC Chicago NPC will make a certification determination thirty (30) calendar days before the date on which the workers are needed.

Applications Accepted for Consideration

If the application is accepted for consideration, the OFLC Chicago NPC will notify the employer in writing. At a minimum, the Chicago NPC's Notice of Acceptance will:

- Authorize conditional access to the interstate clearance system and direct the SWA to circulate a copy of the job order;
- Direct the employer to engage in positive recruitment of U.S. workers and to submit a report of its positive recruitment efforts;
- State that positive recruitment is in addition to and will occur during the period of time that the job order is being circulated by the SWA(s) for interstate clearance and will terminate on the actual date on which the H-2A workers depart for the place of work, or three (3) calendar days prior to the first date the employer requires the services of the H-2A workers, whichever occurs first; and
- State that the CO will make a determination either to grant or deny the Application for Temporary Employment Certification no later than thirty (30) calendar days before the date of need.

Applications Not Accepted for Consideration

If the application is not accepted for consideration, the OFLC Chicago NPC will notify the employer in writing within seven (7) calendar days after receipt of the application. A copy of the notification will be sent to the SWA serving the area of intended employment. The Chicago NPC's Notice of Deficiency will:

- State the reason(s) why the application or job order fails to meet the criteria for acceptance;
- Offer the employer an opportunity to submit a modified application or job order within five (5) business days;
- State that the CO's determination will be made no later than thirty (30) calendar days before the date of need, if that the employer submits the requested modification to the application within five (5) business days, in a manner specified by the CO, and if there has been no appeal made by the employer;
- Offer the employer an opportunity to request an expedited administrative review or a de novo administrative hearing before an Administrative Law Judge; and
- State that if the employer does not comply by submitting a response within five (5) business days or does not appeal, the CO will deny the application. The denial will be final and cannot be appealed.

Submission of Modified Applications

An employer may choose to resubmit an application with modifications required by the Notice of Deficiency. In such instances, an employer should file the modified application within five (5) business days of the Chicago NPC's Notice of Deficiency. The application will be deemed abandoned if the employer does not submit a modified application within twelve (12) calendar days of the Notice of Deficiency.

Appeals of Notices of Non-Acceptance

The Chicago NPC will inform the employer about the administrative appeals process provided for in the regulations at 20 CFR 655 Subpart B.

Recruitment of U.S. Workers

After an employer's application is accepted for processing, the Chicago NPC will require the employer to independently engage in specific positive recruitment efforts within a multi-state region of traditional or expected labor supply if the Chicago NPC determines there is a sufficient supply of labor to be recruited.

The employer must place an advertisement on two (2) separate days, which may be consecutive, one of which must be on a Sunday in a newspaper of general circulation serving the area of intended employment and is appropriate to the occupation and the workers likely to apply for the job opportunity. All advertising must contain the following information:

- The employer's name (if an association, a statement indicating that the name and location of each member of the association can be obtained from the SWA);
- The geographic area of intended employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the services or labor;
- A description of the job opportunity with sufficient information to apprise U.S. workers of services or labor to be performed and the anticipated start and end dates of employment;
- The wage offer(s);
- The three-fourths guarantee;
- If applicable, a statement that work tools, supplies, and equipment will be provided at no cost to the worker;
- A statement that housing will be made available at no cost to the worker;
- A statement that transportation and subsistence expenses to the worksite will be provided by the employer or paid by the employer upon completion of 50 percent of the work contract, or earlier, if appropriate;
- A statement that the position is temporary and a specification of the total number of job openings the employer intends to fill;
- A statement directing applicants to apply for the job opportunity at the nearest office of the SWA.; and
- Contact information for the applicable SWA and, if available, the job order number.

The employer must contact, by mail or other effective means, its former U.S. workers employed by the employer in the occupation at the place of employment during the previous year and solicit their return to the job.

The employer must conduct positive recruitment within a multistate region of traditional or expected labor supply where the CO finds that there are a significant number of qualified U.S. workers who, if recruited, would be willing to make themselves available for work at the time and place needed.

The employer must also prepare, sign, and date a written recruitment report. The recruitment report must be submitted on the date specified in the employer's Notice of Acceptance and contain the following information:

- Identify the name of each recruitment source;
- State the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the recruitment report, and the disposition of each worker;
- Confirm that former U.S. employees were contacted and by what means; and

If applicable, for each U.S. worker who applied for the position but was not hired, explain the lawful job-related reason(s) for not hiring the U.S. worker.

The employer must continue to maintain the recruitment report throughout the entire period of recruitment until 50 percent of the period of the work contract has elapsed.

Certifications Denied and Appeals of Denials of Certifications

If the Chicago NPC denies certification, then the Chicago NPC must notify the employer by means calculated to assure next-day delivery. The notice of denial will state the reasons the certification was denied and will inform the employer about the administrative review process provided for in the regulations at 20 CFR 655, Subpart B.

Certifications Granted

If the OFLC Chicago NPC determines that the employer has complied with the recruitment assurances, the adverse effect criteria, all time requirements and other appropriate requirements established by law and regulation, then the Chicago NPC will grant the temporary foreign agricultural labor certification for the number of job opportunities for which it has been determined there are not sufficient U.S. workers available. After certification has been granted, the employer must continue to positively recruit U.S. workers until the H-2A workers have departed for the place of work. In addition, the [SWA](#) must continue to refer to the employer qualified and eligible U.S. workers who are seeking employment and who apply up to fifty (50) percent of the contract period, and the employer must hire those available U.S. workers. If there is a change of the prevailing wage rate(s) during the course of the contract period, the employer is required to adjust the workers' wage to reflect the new rate(s) upon notification from OFLC.

Violations, Penalties, and Sanctions

The [Wage and Hour Division](#) (WHD) of the Department has a primary role in investigating and enforcing the terms and conditions of employment. WHD is responsible for enforcing the contractual obligations employers have toward employees, and may assess civil money penalties and recover unpaid wages. Administrative proceedings and/or injunctive actions through federal courts may be instituted to compel compliance with an employer's contractual obligations to employees.

The Employment and Training Administration (ETA) enforces other aspects of the laws and regulations. ETA is responsible for administering sanctions relating to substantial violations of the regulations (denial of certification for up to three years) and less than substantial violations of the regulations (reductions of one-fourth of job opportunities certified).

Document Retention Requirements

All employers filing H-2A applications must retain the following documentation:

- Proof of recruitment efforts including:
 - Job order placement
 - Advertising
 - Contact with former U.S. workers
 - Additional positive recruitment efforts
- Substantiation of information submitted in the recruitment report
- The final recruitment report and any supporting resumes and contact information
- Proof of workers' compensation insurance or State law coverage
- Records of each worker's earnings
- The work contract or copy of the Application for Temporary Employment Certification
- An association must retain the additional documentation required for submission of its application

The records and documents must be retained for a period of three (3) years from the date of certification, or from the date of the determination if the application is denied or withdrawn. Documents must be produced to the Department upon request.

Appeals of Employer Penalties

The Chicago NPC will inform the employer about the administrative appeals process provided for in the regulations at 20 CFR 655 Subpart B.

Post Certification

Extensions

Employers seeking short- term extensions of the certified application of two (2) weeks or less must apply directly to DHS for approval. Employers seeking long- term extensions of more than two (2) weeks may apply to the OFLC Chicago NPC. Requests must be supported in writing with documentation showing that the extension is needed and that the need could not have been reasonably foreseen by the employer. The Certifying Officer will notify the employer of the decision in writing if time allows, or will otherwise notify the employer of the decision. The employer may appeal a denial of a request for an extension.

Appeals

If authorized by the regulation, employers may request an administrative review of a decision or de novo hearing of a decision before an Administrative Law Judge (ALJ). If an administrative review is requested, the ALJ will render a decision within five (5) business days. Where a de novo hearing is requested, the ALJ's decision will be rendered within ten (10) calendar days after the hearing. The ALJ's decision is the final decision of the Secretary.

Audit

The OFLC may conduct audits of certified H-2A temporary labor applications. The applications selected for audit will be chosen within the sole discretion of the Certifying Officer. Where an application is selected for audit, the OFLC will issue an audit letter to the employer detailing: 1) the documentation that must be submitted by the employer; 2) a date for receipt of the documentation; and 3) that failure to comply with the audit process may result in the revocation of the certification or program debarment.

OFLC may provide the audit findings and underlying documentation to the Department of Homeland Security (DHS) or other appropriate enforcement agency. The Office will refer any findings that an employer discouraged an eligible U.S. worker from applying, failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, to the Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices.

Revocation

The OFLC may revoke a certified H-2A temporary labor application if the Office finds: 1) fraud or misrepresentation in the application process; 2) substantial violation of a material term or condition of the approved temporary agricultural labor certification; 3) failure to cooperate with a DOL investigation, inspection, audit or law enforcement function; or 4) failure to comply with one or more sanctions or remedies imposed by the WHD, DOL or a court law.

If the employer's H-2A temporary agricultural labor certification is revoked, the employer is responsible for: 1) reimbursement of actual inbound transportation and subsistence expenses; 2) the worker's outbound transportation expenses; 3) payment to the worker of the amount due under the three- fourths guarantee; and 4) any other wages, benefits and working conditions due or owing to the worker.

Debarment

OFLC may debar an employer or successor in interest from receiving future labor certifications for a period up to three (3) years. Debarment may occur if OFLC finds that the employer substantially violated a material term or condition of its temporary labor certification, with respect to H-2A workers, workers in corresponding employment